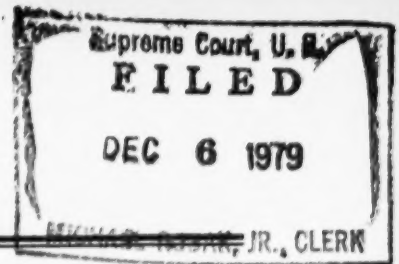


79-872



**IN THE  
Supreme Court of the United States**

OCTOBER TERM, 1979

**No. ....**

CAROL G. BAILEY, individually, and as administratrix of  
SILAS J. BAILEY, Deceased,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

CARL C. BANNO  
146 Old Country Road  
Mineola, New York 11501

*Attorney for Petitioner*

## TABLE OF CONTENTS

Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Pertinent Sections of the FTCA .....	3
Statement of Facts .....	4
The Public Importance of the Issues Presented .....	5
Conclusion .....	7

### Table of Cases

<i>Anderson v. Hayes</i> , 243 N.Y. 140 .....	7
<i>Brooks v. U.S.</i> , 337 U.S. 49 (1948) .....	2,5
<i>Feres v. U.S.</i> , 340 U.S. 135 (1950) .....	2,5,7
<i>Henning v. U.S.</i> , <sup>446</sup> 466 F.2d <sup>774 3<sup>rd</sup></sup> 1138 (4 <sup>th</sup> Cir. 1971) .....	2
<i>U.S. v. Brown</i> , 348 U.S. 110 (1954) .....	2,5
<i>U.S. v. Muniz</i> , 374 U.S. 150 (1963) .....	2,6

### Statutes

28 U.S.C. 1346(b) .....	2,3
28 U.S.C. 2671 et. seq. ....	2

28 U.S.C. 2674 .....	3
28 U.S.C. 2680 .....	3

**Other Authorities**

Air Force Times .....	5
Navy Times .....	5
The Times Magazine .....	5,6

**IN THE  
Supreme Court of the United States**

OCTOBER TERM, 1979

---

CAROL G. BAILEY, individually, and as administratrix of  
SILAS J. BAILEY, Deceased,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

The petitioner, CAROL G. BAILEY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 7, 1979.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A, *infra*, page 1a. The opinion of the United States District Court of the Southern District of New York (Gagliardi, D.J.) and the judgment entered thereon appear at Appendix B, *infra*, pages 2a-3a.

## JURISDICTION

The order or judgment of the United States Court of Appeals for the Second Circuit was entered September 7, 1979. See Appendix A, page 1a, *infra*. This petition was filed within 90 days from said date. The jurisdiction of this Court is invoked under the Federal Tort Claims Act, 28 U.S.C. sec. 2671 et. seq., and its jurisdictional counterpart, 28 U.S.C. sec. 1346(b). Under the FTCA the United States waives its sovereign immunity with regard to tort suits, with certain exceptions and under U.S.C. sec. 1346(b) vests exclusive jurisdiction in the federal district courts over such actions.

## QUESTIONS PRESENTED

1. Has the United States, under the FTCA, waived its sovereign immunity as to tort claims made by military personnel, be they on permanent, temporary, civilian, active or inactive duty as Regular, Reserve or National Guard?

2. Are the doctrines laid down in *Feres v. U.S.*, 340 U.S. 135 (1950); *Henning v. U.S.*, 466 F.2d 1138 (4th Cir. 1971); *U.S. v. Brown*, 348 U.S. 110 (1954); *Brooks v. U.S.*, 337 U.S. 49 (1948); *U.S. v. Muniz*, 374 U.S. 150 (1963), still valid or inconsistent with each other or with the FTCA?

3. Have the aforesaid decisions created great confusion and injustice to the military serviceman, and discriminated against him and unconstitutionally deprived him of his rights?

4. Are the issues presented herein of public importance?

## PERTINENT SECTIONS OF THE FTCA

28 U.S.C. §1346(b) provides:

§1346 United States as defendant:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court of the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674 provides:

§2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c.646, 62 Stat. 983.

28 U.S.C. §2680 provides:



### §2680. Exceptions.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

### STATEMENT OF FACTS

Petitioner is the widow of SILAS J. BAILEY, a civilian, with the rank of Sergeant in the National Guard. She sued herein as administratrix of his estate.

The deceased was a civilian and a member of the Army National Guard, holding the rank of Sergeant E-5. He performed his training periods (inactive duty) one weekend per month. While on such a training period on April 24, 1977, at Fort Drum, New York, he sustained a wound which resulted in his death on April 25, 1977. This occurred when ammunition from a 50-calibre gun owned, operated and controlled by the United States discharged due to the negligence of employees of the United States while acting within the scope of their employment and in the line of their duty.

The United States moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In a memorandum decision filed March 21, 1979, the district court granted the motion deeming it a motion on the pleadings, and, judgment was entered dismissing the complaint. See Appendix B, pages 2a-3a, *infra*. The United States Court of Appeals for the Second Circuit affirmed; see Appendix A, page 1a, *infra*.

The district court asserted there was "confusion among the federal courts" as to when a military person may recover

damages against the United States on tort claims. It recognized the unambiguous nature of the FTCA giving military personnel the right to such claims except when the injuries arise out of combatant activities during time of war in a foreign country. 28 U.S.C. §2680(j) and §2680(1k). The "confusion" does not arise out of the clear mandate of the statute, but from court-created exceptions: *Brooks v. U.S.*, *Feres v. U.S.*, and *Brown*, all *supra*, and further from the interchangeable use by the courts of the phrases "incident to military service" and "in the line of military duty". Because the complaint used the words "on duty," the district court felt it must adhere to the *Feres v. U.S.*, *supra*, doctrine, and apparently reluctantly dismissed the complaint.

On appeal, petitioner argued, among other things, that the deceased was a civilian who was on a training period, referred to as "inactive duty" for a weekend. In spite of this, the Court of Appeals stated: "It is undisputed that SILAS J. BAILEY died . . . while he was on active military duty." The court was in error. A major point was that he was not "on active military duty". Moreover, there was a serious dispute about this point.

Nevertheless, as important as the question of duty and the time of the negligent act as related to the time of the occurrence, are, the Court disregarded all the points raised as to the validity and fairness of the court-created exceptions to the FTCA; the confusion of the decisions of the various federal courts; and the public importance of this issue.

### THE PUBLIC IMPORTANCE OF THE ISSUES PRESENTED

The question is best illustrated by an article in *The Times Magazine* which is widely circulated as a supplement to the *Army Times*, *Navy Times*, and *Air Force Times*. It is the October

1, 1979, issue. The front cover has a picture of the Supreme Court of the United States and it states: "If your military doctor makes a mistake, can you sue?" The article begins on page 6 and ends on page 12. Over various pictures of the Supreme Court, it states: "If you are on active duty, you cannot sue the government for medical malpractice. Is that Justice? Military people are deprived of a right allowed to all other Americans: the right to sue the government for damages." The roots of this 'incredible justice' go back to a little-noticed Supreme Court case in 1950" (*Feres*). The article concludes with such conclusions as: "The real issue, however, isn't money, but civil rights for active duty people." "But what about fairness, simple equality under the law?"

The military are a minority and the court has singled them out as unworthy to be treated as other citizens. In apparent reference to *United States v. Muniz, supra*, the said article claims "Even federal prisoners, courts have ruled, have that right. In effect, *The Times Magazine* believes, active duty people have been categorized as second-class citizens."

It is significant the writer of the article did her homework, for she says: "Over the decades since that Supreme Court ruling — the so-called *Feres Doctrine* — various lower courts in the country have interpreted the doctrine in different ways, causing widely unequal rulings. Some courts have ruled that a serviceman injured on leave could sue the government, others that he could not. Other judges have emphasized location — if the injury occurred off base, service people could sue: if it happened on base, they could not. The result has been legal confusion and, for some . . . personal tragedy."

Looking at the problem from a fair view, the FTCA is clear and unambiguous and grants all citizens the right to sue except

as specifically provided, and, for military personnel, except when injured overseas in combat. If *Feres* had any usefulness, it now has outlived it. If the Court cannot adopt this reasoning, then the confusion should be ended and all exceptions within exceptions should be eliminated. A bold declaration should be made that all military men, whatever their connection with the military, have no rights under the FTCA. In that respect they are not equal to their fellow-Americans who are in no way connected with the military.

Certainly, this course would be unwise, particularly in these times of crises. Voluntary enlistments are falling. The military personnel are being stripped of many benefits and rights. Denying them basic rights, such as the right to sue, is undoubtedly a source of dissatisfaction which will further endanger our defense forces by reducing enlistments and re-enlistments.

It was Judge Cardozzo, in *Anderson v. Hayes*, 243 N.Y. 140, at 146, who said: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

CARL C. BANNO  
146 Old Country Road  
Mineola, New York 11501  
*Counsel for Petitioner*

# APPENDIX

2a

## APPENDIX B

### MEMORANDUM DECISION OF DISTRICT COURT

---

**CAROL G. BAILEY, individually, and as Administratrix of the  
Estate of SILAS J. BAILEY, Deceased,**

*Plaintiff,*

-against-

**UNITED STATES OF AMERICA,**

*Defendant.*

78 Civ. 674

---

**GAGLIARDI, D.J.**

Plaintiff Carol Bailey, the widow of Silas J. Bailey and the administratrix of his estate, seeks damages for his alleged wrongful death in this action brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 *et seq.* Jurisdiction is premised upon 28 U.S.C. §1346(b). The government has moved for judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P. For the following reasons, the motion is granted.

Plaintiff alleges that the deceased was a sergeant with the New York National Guard and was on duty at Fort Drum, New York on April 24, 1977 when ammunition discharged from a 50-calibre machine gun situated on a tank struck him causing his death. Plaintiff claims that her husband's death resulted from the negligent maintenance of the machine gun and tank and the negligent training of the decedent's superior officers.

There is some confusion among the federal courts concern-



## APPENDIX A

Opinion of United States Court of Appeals  
for the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the 7th day of September 1979.

Present: Hon. Irving R. Kaufman, Ch.J.; Jon O. Newman, Amalya L. Kearse, Circuit Judges.

[TITLE] 79-6073

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

It is undisputable that Silas J. Bailey died as a direct result of wounds inflicted while he was on active military duty. Recovery under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, is, therefore, foreclosed <sup>under</sup> *Feres against U.S.*, 340 U.S. 135 (1950). Accord, *Spencel Aero Engineering Corp. against U.S.*, 431 U.S. 666 (1977), *Camassar against U.S.*, 531 F.2d 1149 (2d Cir. 1976)

[SIGNED]

Irving R. Kaufman, Ch. J.  
Jon O. Newman, Amalya L. Kearse  
Circuit Judges

ing the circumstances under which members of the armed forces may recover against the United States for negligently inflicted injuries. Although the statute unambiguously bars only claims "arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war," 28 U.S.C. §2860(j) and "arising in a foreign country", *id.* §2860(k), a non-statutory exception, and the resultant confusion, arises from three United States Supreme Court cases. *Brooks v. United States*, 337 U.S. 49 (1949); *Feres v. United States*, 304 U.S. 135 (1950); *United States v. Brown*, 348 U.S. 110 (1954)l. The confusion stems from the Court's interchangeable use of two phrases to define the appropriate standard: servicemen are barred from recovery for injuries incurred either "incident to military service" or "in the line of military duty". See *Hale v. United States*, 416 F.2d 355, 358-59 (6th Cir. 1969) (citing cases adopting one or the other or both standards), *Milliken v. United States*, 439 F.Supp. 290, 294 (D. Kan. 1976). "Incident to military service" is arguably a far broader limitation than "line of duty" and, therefore, more favorable to the government. Two more recent Supreme Court cases, in dicta, appear to adopt the "line of duty" construction. See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669 (1979) (referring to *Feres* doctrine as precluding recovery by federal soldier for injury sustained while "on duty"); *United States v. Muniz*, 374 U.S. 150, 162 (1963), (explaining *Feres* in terms of the policies at stake when acts committed "in the course of military duty"). Even if this more favorable standard for servicemen is applied to this case, however, the action must be dismissed. The complaint alleges quite clearly that the deceased incurred his injury "while stationed on duty at Fort Drum, Watertown, New York." (Complaint, par. 6)(emphasis added).

The government's motion for judgment on the pleadings is granted. Let the clerk enter judgment dismissing the complaint.

So

Ordered.

S/Leo P. Gagliardi, U.S.D.J.

Dated: New York, New York, March 21, 1979.